IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-635

DAVID DEUTSCH, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 16, 1979

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COMMISSIONER OF INTERNAL REVENUE,

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for The Second Circuit.

The Court of Appeals affirmed the dismissal by the U. S. Tax Court of a petition for prepayment review of a U. S. Internal Revenue Service (IRS) Notice of Deficiency with respect to certain income taxes. The Tax Court has no record of

receipt of the petition, although the taxpayer's accountant testified that he mailed one to the Tax Court and a copy to a named IRS official. The IRS offered no evidence to refute that presented by the taxpayer's accountant.

The Second Circuit held, inter alia, that (1) the governing statute requires actual delivery of the petition, rather than constructive delivery to the Postal Service, and (2) evidence of mailing and timeliness other than the postmarked document is not admissible.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 599 F.2d 44 (2d Cir.,1977), and is reprinted as Appendix A, pp.1a-7a, infra). The order of the Court of Appeals denying Petitioner's petition for rehearing and suggestion of en banc hearing is reprinted as Appendix

B (pp.8a-10a infra). The Tax Court's unreported Order is reprinted as Appendix C (p. 11a, infra).

JURISDICTION

The judgment of the Court of Appeals was entered May 30, 1979. Petitioner's timely petition for rehearing and suggestion for en banc hearing was denied July 18, 1979. This petition for certiorari was filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. Whether constructive delivery of a U. S. Tax Court petition by timely deposit by regular mail (as opposed to registered mail) with the U. S. Postal Service is sufficient to confer jurisdiction on the U. S. Tax Court.

2. Whether evidence other than the

received document is admissible as proof of the mailing and timeliness of a petition to the U. S. Tax Court, when regular mail is used.

3. Whether proof of timely and properly addressed mailing creates a rebuttable presumption that the document was received by the proper party and received within time.

4. Whether the failure of the IRS to produce evidence in its possession which conceivably might rebut the taxpayer's evidence creates a presumption that the evidence in the possession of the IRS is harmful to the IRS's case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the U. S. Constitution (Appendix D, p.13a infra, the first portion of Article III, Section 2 of the Constitution (Appendix E, p.13a

infra), 26 U.S.C.section 6213(a) (Appendix F, p.13a infra), and 26 U.S.C.section 7502 (Appendix G, pp.14-16a infra).

STATEMENT OF THE CASE

The Internal Revenue Service (IRS) issued a Notice of Deficiency dated June 29, 1977, to David Deutsch.

The U. S. Tax Court has no record of having received a timely petition for review. Subsequent to the expiration of the statutory time limit Mr. Deutsch's accountant inquired of Tax Court personnel whether they had received a timely petition. Upon being informed that they had not received any petition--timely or otherwise--the accountant arranged for a copy of the document he had thought the Tax Court had received to be sent October 12, 1977. The taxpayer has never placed reliance on that filing.

At a subsequent Tax Court hearing on

an IRS Motion to Dismiss for Lack of Jurisdiction, Mr. Deutsch's accountant testified that on August 4, 1977, he personally mailed a petition to the Tax Court in a properly addressed and stamped envelope. The October 12, 1977 filing was an exact copy of that original petition. August 4, 1977, was well within the statutory filing period.

The accountant also testified at the hearing that he had sent an exact copy to the Los Angeles office of IRS on August 4, 1977. That office had handled the matter. He also testified that he was later telephoned by a Mr. Weissman of that office who acknowledged receipt of the document and told the accountant to wait to hear from the Tax Court. The IRS never produced Mr. Weissman or any statement from him disputing the accountant's testimony even though both sides were permitted to

file memoranda of law after the hearing.

The petition was in the form of a letter to the Los Angeles IRS office, and stated in relevant part

> . . . If for any reason we cannot obtain such a meeting, kindly consider this as our petition with the United States Tax Court. We are sending a copy of this letter to the United States Tax Court, 400 Second Street, N. W., Washington, D. C. 20217, to register our decision to petition and contest your determination with the United States Tax Court.

Neither the IRS nor the Tax Court objected to the substantive adequacy of the contents of that document as a petition.

By Order entered July 6, 1978, dismissal for lack of jurisdiction was entered by Chief Judge Moxley J. Featherstone, rather than by Special Trial Judge Fred S. Gilbert who had conducted the oral hearing. The Order made no reference to the August 4, 1977 petition, relied exclusively on the October 12, 1977

document, and did not address any of the legal or factual issues argued at length by counsel.

A timely Notice of Appeal was filed. The Appeal was noted to the Second Circuit because the petition to the Tax Court was filed at a time when the taxpayer was a resident of New York City.

The Court of Appeals held, in relevant part:

> . . . The legislative history indicates that section 7502 is only applicable if the petition is actually delivered. . . .

Slip Op. at 2842 (citations omitted);

> Delivery for these purposes is synonymous with receipt of the item.

Slip Op. at 2843 (citation omitted);

> Taxpayer argues that Section 7502 creates a presumption in favor of the taxpayer and that, if such section does not apply, the taxpayer can prove delivery and timeliness by other evidence without benefit of the presumption. We disagree. . . . Where, as here, the exception

(Continued. . .)

> of section 7502 is not literally applicable, courts have consistently rejected testimony or other evidence as proof of the actual date of mailing.

Slip Op. at 2843 (citations omitted);

> We are not persuaded of any unconstitutionality in Congress' intent, manifested in section 7502, to limit proof of mailing to some type of objective evidence. Both administrative convenience and the likelihood that a petition never received was never sent support the rationale of the section.

Slip Op. at 2843.

A petition for rehearing and suggestion of en banc hearing was timely filed and denied.

Taxpayer has posted security with the IRS. (The Tax Court would not set a bond because it did not have jurisdiction. Taxpayer has offered to post any additional security the Court of Appeals may require).

REASONS FOR GRANTING THE WRIT

I. 26 U.S.C.SECTION 7502 APPLIES TO THE MAILING OF ALL TAX-RELATED DOCUMENTS; THUS, THE COURT OF APPEALS' RULING CREATES A WINDFALL FOR THE IRS SINCE IT WOULD PENALIZE ANY TAXPAYER, CONTRARY TO THE SPECIFIC LEGISLATIVE INTENT, WHENEVER AN IRS OR OTHER OFFICIAL MISLAID OR LOST A DOCUMENT WITHOUT HAVING KEPT A RECORD OF ITS RECEIPT AND WHENEVER THE U. S. POSTAL SERVICE COMMITTED THE MOST EGREGIOUS ERROR OF WHOLLY LOSING THE DOCUMENT.

The jurisdictional statute, 26 U.S.C.section 6213(a), provides only that "[w]ithin 90 days . . . the taxpayer may file a petition with the Tax Court." Nothing in that statute or its legislative history indicates that filing requires actual delivery to the premises of the addressee.

The parties agree that the relevant statute is 26 U.S.C.section 7502 which establishes rules of evidence to determine the timeliness of tax-related mailings where there is a legible postmark.

By its express terms that section applies to

> . . . any return, claim, statement, or other document required to be filed, or any payment required to be made. . . .

Thus, although the instant case concerns a petition to the U. S. Tax Court, the practical result of a requirement for actual rather than constructive delivery is a windfall for the IRS[1/] whenever one of its employees mislays or loses a document without having kept a record of receipt, or whenever the U. S. Postal Service wholly loses a document. As the Tax Court has noted, discussing IRS record keeping,

> This would not be the first time that a collector had lost a return.

Ferguson v. Commissioner, 14 T.C. 846,

1/ The petitioner has not discounted, and preserved below, the possibility that a Tax Court official or even a Tax Court guard might have mislaid the petition.

850 (1950).

Such a result is contrary to the legislative intent which the Tax Court has stated, in a seminal case, is

> . . . to eliminate the inequities resulting from variations in postal performance when a document is timely mailed. . .,

Fred Sylvan v. Commissioner, 65 T.C. 548, 551 (1975), so that a taxpayer will not be deprived of his or her day in the Tax Court

> . . . due to circumstances wholly beyond the taxpayer's control. . .

Sylvan v. Commissioner, supra, 65 T. C. at 553 n. 11.

What could be more egregious a Postal Service error than total loss of the document and its wrapper?

Such a result is also contrary to the express terms of the statute which provide, with respect to regular mail, that when the document is "delivered" to the

addressee the date of the postmark "shall be deemed" "the date of delivery". That very provision authorizes constructive delivery when regular mail is used since the document may not actually arrive at its destination within the statute of limitations.

The legislative history of section 7502 is sparse and essentially tracks the terms of the statute,[2/] although it does refer to documents "received". But there is no specification for actual delivery or actual receipt. And the references in the statute and the legislative history to "delivered" and "received" only concern those situations where there is a legible postmark.

While the instant taxpayer still

2/H.Rept.1337, 83rd Cong., 2d Sess. 434-35, reprinted at 3 U.S.Code Cong. & Admin. News 4017, 4583 (1954); S.Rep.1622, reprinted at 3 U.S.Code Cong. & Admin. News 4621, 5266 (1954), 83rd Cong., 2d Sess. 615.

has the option of seeking a refund, Phillips v. Commissioner, 283 U.S. 589 (1931), no such recourse will be available, for example, where a timely refund claim is lost or where a penalty is assessed because of late filing.

Even with respect to the instant petitioner, a Court "should not adopt an interpretation which curtails [the right to prepayment review] in the absence of a clear congressional intent to do so. Samuel J. King v. Commissioner, 51 T.C. 851, 855 (1969); Sylvan v. Commissioner, supra, 65 T.C. at 553 n. 11.

Phillips is also distinguishable since the instant petitioner, unlike the one in Phillips, has posted security.

II. THE COURT OF APPEALS' REQUIREMENT OF ACTUAL DELIVERY IS CONTRARY TO THE HOLDINGS OF ALL THE COURTS THAT HAVE CONSIDERED THE SAME ISSUE

Two other circuits have considered the situation where a tax related document and its wrapper were completely lost without any record of delivery to the addressee and without use of registered mail. Both circuits found for the taxpayer.

In Crude Oil Corporation of America v. Commissioner, 6 T.C. 648 (1946), reversed with instructions, 161 F.2d 809 (10th Cir. 1947), the Tax Court acknowledged that there is a "presumption of delivery, from the mailing", Id., 6 T.C. at 652 (citations omitted), but concluded that the election at issue had not been timely because there was no evidence that the document had actually been delivered to and received by IRS. The Court of Appeals reversed, noting in a thorough

review of the case law, that

> When mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.
>
> The presumption of receipt is a strong one. A finding in opposition to such inference of fact, absent evidence of non-receipt, is against the weight of the evidence.
>
> Proof of due mailing is prima facie evidence of receipt.

Crude Oil Corporation v. Commissioner, supra, 161 F.2d at 810.[3/]

3/ Citing, inter alia, Rosenthal v. Walker, 111 U.S. 185, 193 (1884); Henderson v. Carbondale Coal & Coke Co., 140 U.S. 25, 37 (1891); Arkansas Motor Coaches v. Commissioner, 198 F.2d 189 (8th Cir.1952).

Section 7502 provides that a stamped registered mail receipt prima facie complies with the Crude Oil test. Absent a registered mail receipt, the taxpayer must introduce "evidence, sufficient to sustain a contrary finding", 161 F.2d at 810, in order to overcome the presumption of the correctness of the Commissioner's finding.

In Haag v. Commissioner, 59 F.2d 516 (7th Cir. 1932), the panel similarly concluded that where there was evidence that a letter to the IRS was properly mailed

> . . . the presumption arises that it was received. It follows, therefore, that we must assume that the letter was sent by petitioner and received by the Commissioner and later apparently lost or misplaced.

Haag v. Commissioner, supra, 59 F.2d at 517. In the instant case the petition was either lost or mislaid by the Tax Court or by the Postal Service.

The Second Circuit never discussed those cases, although they were thoroughly brief.

The IRS sought to distinguish them. IRS first argued that neither case involved a Tax Court filing; but section 7502 applies to all tax-related mailings. And incantation of the term "jurisdictional" does not itself require delivery to the physical premises of the Tax Court. Central Paper Co. v. Commissioner, 199 F.2d 902, 903 (6th Cir. 1952)(delivery to a ledge next to a post office box rented by the Tax Court). The IRS also noted that Crude Oil, Haag and Central Paper were decided before the enactment of section 7502. But the significance of that is the opposite of that posed by IRS. Before enactment of section 7502 actual delivery was always necessary (as a practical matter, although not expressly stated), because the date of delivery to, and receipt

at the Tax Court was determinative of the timeliness. Section 7502 relaxed this burden.

III. THE COURT OF APPEALS' REQUIREMENT OF ACTUAL DELIVERY WHEN REGULAR MAIL IS EMPLOYED CREATES AN IRRATIONAL DISTINCTION.

Section 7502(c)(1) provides that where registered mail is used

> (A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and
>
> (B) the date of registration shall be deemed the postmark date.

While asserting that actual delivery is necessary for regular mail, IRS conceded (and the Court of Appeals did not deny) that subparagraph (A) authorizes constructive delivery for registered mail.

However, a distinction between regular and registered mail is rational only with respect to the issue of timeliness.

A Postal Service employee receiving the registered document might not have it postmarked immediately and the stamped registered mail receipt is reliable evidence, in the absence of evidence to the contrary, that the document had been given to the employee at the time indicated on the stamped receipt.

But once a prima facie demonstration is made that the document was given into the custody of the Postal Service, a stamped registered mail receipt provides not the slightest greater reliability than prima facie proof of regular mailing that the document was actually delivered to the physical custody of the Tax Court or any other addressee. Section 7502(c)(1)(A) will never serve a purpose with respect to registered mail until the document sent by registered mail and its wrapper have totally disappeared.

For the same reasons, even the provision that a stamped registered mail receipt is prima facie evidence of delivery has no rational connection to the fact presumed, if actual delivery to the Tax Court is the fact presumed.

See Bingler v. Johnson, 394 U.S. 741, 749-750 (1969); Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); United States v. Correll, 289 U.S. 299 (1967). Also, Bolling v. Sharpe, 347 U.S. 497 (1954); Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed, 219 U.S. 35, 42-43 (1910)[4/].

4/ Treasury Regulation 26 C.F.R.section 301.7502-1, cited by IRS and the Court of Appeals, does not specify whether delivery must be actual. To the extent it is interpreted to mandate actual delivery when regular mail is used, it would make the same irrational distinction and relationship as the Court of Appeals' interpretation of section 7502.

See also, Usery, et al. v. Turner Elkhorn Mining Co., et al., 428 U.S. 1 (1976).

IV. THE COURT OF APPEALS' HOLDING THAT EVIDENCE OTHER THAN A POSTMARK IS NOT ADMISSIBLE IS CONTRARY TO THE RULE IN EVERY OTHER CIRCUIT AND AN UNBROKEN LINE OF TAX COURT RULINGS.

The Court of Appeals concluded that "courts have consistently rejected testimony or other evidence as proof of the actual date of mailing."

That is contrary to the rule of this Court that

> [T]he party affected [must have] a reasonable opportunity to submit. . . all of the facts bearing upon the issue, ...

Mobile, Jackson & Kansas City R.R. v. Turnipseed, supra, 219 U.S. at 43; Schlesinger v. Wisconsin, 270 U.S. 230, 239-40 (1926); Hagner v. United States, 285 U.S. 427, 430 (1932).

The Court of Appeals'ruling is also contrary to Crude Oil, Haag, and Central Paper, cited above, and to one of the cases relied on by the Court of Appeals.

In Shipley v. Commissioner, 572 F.2d 212, 214 (9th Cir.1977), cited by the panel below, the court stated that section 7502

> does allow the date of mailing to be shown by evidence other than tangible evidence of a mark made by the post office, [noting that in such situations] the regulations require [only] a showing by way of facts beyond the taxpayer's control which independently corroborate the date of mailing.

To the same effect is Skolski v. Commissioner, 351 F.2d 485, 488 (3rd Cir.1965), and dicta in Bloch v. Commissioner, 254 F.2d 277, 279 (9th Cir.1958). See also, C. Louis Wood v. Commissioner, 41 T.C. 593 (1964), aff'd 338 F.2d 602 (9th Cir. 1964). All of the foregoing cases were discussed in Sylvan, supra, which involved an envelope with no postmark. In Sylvan the Tax Court concluded that where there was no postmark or no legible postmark

it would look to other evidence. The Tax Court held that

> For the purpose Congress had in mind in referring to a postmark, a postmark was simply not available.
>
> . . .
>
> . . . [E]vidence as to timely mailing is admissible. . . . To hold otherwise would make the important right to a prepayment hearing depend entirely on the form by which a postal omission is manifested.

Sylvan v. Commissioner, supra, 65 T.C. at 553 (emphasis in original)[5]. The instant case is yet another variation of the missing postmark, albeit the most egregious postal error.

The only case that supported the Court of Appeals was Jacob L. Rappaport

5/ Also, Ruegsegger v. Commissioner, 68 T.C. 463 (1977)(no postmark); Mason v. Commissioner, 68 T.C. 354 (1977)(illegible postmark); Thompson v. Commissioner, 66 T.C. 737 (1976)(mailing envelope not retained by IRS).

v. Commisssioner, 55 T.C. 709 (1971), aff'd per curiam in open court without opinion, 456 F.2d 1335 (2d Cir.1972). But Rappaport was expressly overruled by Sylvan; and Rappaport is of no precedential value because of the manner in which it was affirmed. United States v. Joly, 493 F.2d 672 (2d Cir.1974).

All the other cases relied on by the Court of Appeals or the IRS are distinguishable because there existed a legible and undisputably untimely postmark.[6]

6/ Drake v. Commissioner, 554 F.2d 736 (5th Cir.1977); Shipley v. Commissioner, supra; Boccuto v. Commissioner, 277 F.2d 549 (2d Cir.1960); Galvin v. Commissioner, 239 F.2d 166 (2d Cir.1956). Fishman v. Commissioner, 51 T.C. 869 (1969), aff'd 420 F.2d 491(2d Cir. 1970), also cited by the Court of Appeals, concerns certified mail which is subject to greater abuse and different regulations and statutory provisions.

V. THE COURT OF APPEALS' HOLDING PROHIBITING THE ADMISSIBILITY OF EVIDENCE OTHER THAN A LEGIBLE POSTMARK VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE CONSTITUTIONAL SEPARATION OF POWERS.

Dean Wigmore summarizes the law, noting the traditional distinction between a permissible substantive rule of law, a permissible rebuttable evidentiary presumption, and an impermissible irrebuttable presumption.

> . . . It is one thing for the judiciary . . . to choose to accept the aid of an official certificate in reaching its determination; but is quite a different thing for the judiciary to be forbidden altogether to exercise its power in a certain class of cases. The judicial function under the constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function.

(Continued. . . .)

> Hence, to make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province.

J. H. Wigmore, Evidence (3rd ed.1940), sections 1353-54, 2493 (footnotes and citations omitted).

> . . . [T]he party affected [must have] a reasonable opportunity to submit . . . all of the facts bearing upon the issue, ...

Mobile, Jackson & Kansas City R. R. v. Turnipseed, supra, 219 U.S. at 43. Also, other citations included at page 22, supra.

VI. THE COURT OF APPEALS' REFUSAL TO TO HOLD THAT THE IRS' FAILURE TO PRODUCE MR. WEISSMAN'S STATEMENT TO CONTRADICT THAT OF THE TAXPAYER'S ACCOUNTANT CREATED A PRESUMPTION THAT MR. WEISSMAN'S EVIDENCE WOULD BE UNFAVORABLE TO THE GOVERNMENT, IS CONTRARY TO THE HOLDINGS OF THIS COURT AND EVERY OTHER CIRCUIT THAT HAS CONSIDERED IT, AS WELL AS THE TAX COURT.

The Tax Court pointedly omitted reference to the testimony of the account-

tant that on August 4, 1977, he had sent an exact copy of the petition to the Los Angeles office of IRS, and that a Mr. Weissman of that office telephoned him in response. This omission was not an oversight since it was repeatedly emphasized by petitioner, and the Court of Appeals devoted a substantial amount of time to it at oral argument.

The copy sent to Los Angeles corroborates the accountant's testimony that he mailed a copy to the Tax Court. The copy was sent to Los Angeles nearly two months before the statute of limitations would expire. It stated on its face that a copy was being sent to the Tax Court. And whether or not the IRS still had the letter (or perhaps lost it) is irrelevant; Mr. Weissman's recollection of receipt suffices in the absence of the letter itself, and his negative recollection is necessary to contradict the accountant's.

But the Court of Appeals ignored the law in the federal courts and the Tax Court.

> The rule is well established that the failure of a party to introduce evidence within his possession and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable. . . . This is especially true where, as here, the party failing to produce the evidence has the burden of proof or the other party to the proceeding has established a prima facie case. . . .

Wichita Terminal Elevator Co., et al. v. Commissioner, 6 T.C. 1158, 1165 (1946) (citations omitted); Kirby v. Tallmadge, 160 U.S. 379, 383-384 (1896); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939); Mammoth Oil Co. v. United States, 275 U.S. 12, 52 (1927); United States v. Johnson, 288 F.2d 40, 45 (5th Cir.1961).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 804—August Term, 1978.

(Argued April 9, 1979 Decided May 30, 1979.)

Docket No. 79-4004

DAVID DEUTSCH,

Petitioner-Appellant,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before:

OAKES and GURFEIN, *Circuit Judges,*
and PIERCE, *District Judge.* *

Appeal from a decision of the United States Tax Court dismissing appellant's petition for redetermination of tax deficiency, on the ground that it was not timely filed.

Affirmed.

* Honorable Lawrence W. Pierce, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

MARTIN S. ECHTER, Washington, D.C. (Ira M. Lowe, Washington, D.C., of Counsel) *for Petitioner-Appellant.*

MARY L. JENNINGS, Washington, D.C. (M. Carr Ferguson, Assistant Attorney General; Gilbert E. Andrews and Daniel F. Ross, Attorneys, Tax Division, Department of Justice, of Counsel) *for Respondent-Appellee.*

PIERCE, *District Judge:*

This is an appeal from the dismissal of a petition to the United States Tax Court on the ground that the petition was untimely filed.

On June 29, 1977, the Internal Revenue Service issued a notice of deficiency to the taxpayer David Deutsch for a total of $27,006.68. On October 12, 1977, 105 days after issuance of the notice, the Tax Court received and filed as a petition a copy of a letter dated August 4, 1977 and postmarked "Oct. [illegible] 1977." This letter was signed by the taxpayer's accountant,[1] and although addressed to the Internal Revenue Service office in Los Angeles, the letter stated that a copy was being sent to the United States Tax Court. For reasons which do not appear on the record, the copy allegedly addressed to the Tax Court was never found

1 In his motion to dismiss, the Commissioner also alleged that the petition was not filed by the taxpayer personally or by counsel admitted to practice before the Tax Court, as required by Rule 200, United States Tax Court Rules of Practice & Procedure (Jan. 1, 1974), and that the petition did not conform to the pleading requirements of Rules 33 and 34(b) of those Rules. Taxpayer contends that the accountant was an authorized agent for the taxpayer. The Tax Court did not address these allegations in its order dismissing the petition and they are accordingly not before the Court now.

or presented. The Commissioner moved to dismiss the petition for lack of jurisdiction. In response, the taxpayer offered the affidavit of his accountant who claimed he had mailed the copy of the letter to the Tax Court on August 4, 1977, within the ninety day period prescribed.[2]

A Special Trial Judge of the Tax Court Fred S. Gilbert held a hearing on April 26, 1978 at which the accountant testified regarding the issue of the mailing. On July 6, 1978, Chief Judge C. Moxley Featherston dismissed the petition on the ground that it was not timely filed and thus the Tax Court lacked jurisdiction.

Taxpayer appeals the Tax Court dismissal, contending that his petition was timely filed since his accountant testified that it was timely mailed.

It is not disputed that the Tax Court cannot assert jurisdiction unless a petition is filed within ninety days after a deficiency notice has been mailed by the Commissioner. *Vibro Manufacturing Co. v. Commissioner,* 312 F.2d 253 (2d Cir. 1963) (per curiam). Section 7502[3] of the Internal

2 Section 6213 of the Internal Revenue Code provides in pertinent part:

"Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency . . . ." I.R.C. § 6213(a).

3 Section 7502 of the Internal Revenue Code provides in pertinent part:

"(a) General Rule.—

(1) Date of delivery.—If any return claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the

Revenue Code provides guidance for determining filing when a petition is mailed. In certain cases, the date of the postmark or the date of registration will be deemed the date of delivery to the Tax Court. However, in the present case, there is no postmark or registration receipt that indicates timely mailing. Further, the legislative history indicates that section 7502 is only applicable if the petition is actually delivered. See H. Rep. No. 1337, 83d Cong., 2d Sess. 434-35, as reprinted in 3 U.S. Code Cong. & Ad. News 4017, 4583 (1954); S. Rep., as reprinted in 3 U.S. Code

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United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements.—This subsection shall apply only if—

(A) the postmark date falls within the prescribed period or on or before the prescribed date—

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or (ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

. . .

(c)(1) Registered mail.—For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail—

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail.—The Secretary or his delegate is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail."

Cong. & Ad. News 4621, 5266 (1954). Delivery for these purposes is synonymous with receipt of the item. See 26 C.F.C. § 301.7502-1(d)(1978).

Taxpayer argues that Section 7502 creates a presumption in favor of the taxpayer and that, if such section does not apply, the taxpayer can prove delivery and timeliness by other evidence without benefit of the presumption. We disagree. The exception embodied in section 7502 and the cases construing it demonstrates a penchant for an easily applied, objective standard. See *Fishman v. Commissioner,* 420 F.2d 491 (2d Cir. 1970). Where, as here, the exception of section 7502 is not literally applicable, courts have consistently rejected testimony or other evidence as proof of the actual date of mailing. See, e.g., *Shipley v. Commissioner,* 572 F.2d 212, 214 (9th Cir. 1977); *Drake v. Commissioner,* 554 F.2d 736, 738-39 (5th Cir. 1977); *Boccuto v. Commissioner,* 277 F.2d 549, 553 (2d Cir. 1960).

Taxpayer further argues that it is a denial of due process to bar him from proving that he mailed his petition in any way other than provided by section 7502. We are not persuaded of any unconstitutionality in Congress' intent, manifested in section 7502, to limit proof of mailing to some type of objective evidence. Both administrative convenience and the likelihood that a petition never received was never sent support the rationale of the section.

Further, we note that the taxpayer is not without redress. After paying the deficiency he may file a claim for refund and, if that claim is denied, he may commence an action in the district court to recover the tax paid. See 28 U.S.C. § 1346(a)(1) (1976). The constitutionality of such a result has been upheld. See *Phillips v. Commissioner,* 283 U.S. 589, 595-97 (1931).

The order of the Tax Court is therefore affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of May one thousand nine hundred and seventy-nine.

Present: HON. JAMES L. OAKES
Circuit Judge

HON. MURRAY I. GURFEIN
Circuit Judge

HON. LAWRENCE W. PIERCE
District Judge

Circuit Judges

DAVID DEUTSCH, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee	79-4004

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

/S/
BY: Arthur Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-nine.

----------x Docket No.79-4004

DAVID DEUTSCH,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL

REVENUE,

Respondent-Appellee.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active judge or judge who was a memger of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/S/
IRVING R. KAUFMAN, Chief Judge

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-nine.

Present:

HON. JAMES L. OAKES,

HON. MURRAY I. GURFEIN,

Circuit Judges

HON. LAWRENCE W. PIERCE,

District Judge

Docket No.79-4004

DAVID DEUTSCH,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

A petition for rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk
/S/
by: Sara Piovia
Deputy Clerk

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

DAVID DEUTSCH, Petitioner,	)	
v.	)	Docket No. 10959-77
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Respondent, on December 27, 1977, filed a motion to dismiss this case for lack of jurisdiction upon the ground that the petition was not filed within the time prescribed by the applicable provisions of the Internal Revenue Code of 1954. Petitioner, on February 6, 1978, filed a written response thereto.

Respondent's motion was set down for hearing on April 26, 1978, in Washington, D.C. Arguments on behalf of both parties were heard at that time; and the Court received evidence, in the form of testimony by a witness for petitioner, as to the date of mailing of an alleged petition that was never received by the Court. Subsequently, briefs were filed on behalf of both parties and were considered by the Court.

Since it appears from the record that the statutory notice of deficiency was mailed to petitioner by respondent on

June 29, 1977, and that the petition herein was not filed with the Court until October 12, 1977, the petition was not filed within the 90 days prescribed by section 6213(a) of the Internal Revenue Code of 1954. Inasmuch as the filing of a petition within this said 90-day period is necessary to invoke the jurisdiction of this Court, it is

ORDERED that this case is hereby dismissed for lack of jurisdiction.

(Signed) C. Moxley
Featherston

Chief Judge

ENTERED: JUL 6 1978

APPENDIX D

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (DUE PROCESS CLAUSE):

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

APPENDIX E

ARTICLE III, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .

APPENDIX F

26 U.S.C.Section 6213(a):

> Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . . .

APPENDIX G

26 U.S.C.section 7502. Timely mailing treated as timely filing and paying.

(a) General rule.

(1) Date of delivery.

If any return, claim, statement or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim statement or other document, or payment is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements.

This subsection shall apply only if--

(A) the postmark date falls within the prescribed period or on or before the prescribed date--

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim statement or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

(b) Postmarks.

This section shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulations prescribed by the Secretary or his delegate.

(c) Registered and certified mailing.

(1) Registered mail.

For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail--

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail.

The Secretary or his delegate is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

(d) Exceptions.

This section shall not apply with respect to--

(1) the filing of a document in, or the making of a payment to, any court other than the Tax Court.

(2) currency or other medium of payment unless actually received and accounted for, or

(3) returns, claims, statements, or other documents, or payments, which are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than by mailing.

. . . .

No. 79-635

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID DEUTSCH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-635

DAVID DEUTSCH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the Tax Court's dismissal of this case on the ground that his petition had not been filed with that court within the 90-day period following mailing of a notice of deficiency, as required by Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts are as follows: On June 29, 1977, the Commissioner of Internal Revenue mailed a notice of deficiency to petitioner (Pet. App. 2a). In response to the notice, petitioner's accountant mailed to the Internal Revenue Service in Los Angeles, Cali-

fornia, a letter dated August 4, 1977, that petitioner now asserts should have been taken to be a petition to the Tax Court (R. 5).[1] Petitioner alleges that a copy of this letter was transmitted to the Tax Court, although the date of such alleged transmittal does not appear in the record (R. 26, 38-48). The Tax Court has no record of having received that copy of the letter (R. 20).

After the 90-day period following the mailing of the notice of deficiency had expired, petitioner sent a copy of the August 4, 1977, letter to the Tax Court. That copy was filed as a petition on October 12, 1977. Petitioner does not rely upon the October 12 filing as it was out of time (see Pet. 5). Instead, he contends (Pet. 10-25) that he should be permitted to prove that a "first" petition (the August 4, 1977, letter) was mailed to the Tax Court within the prescribed 90-day period, and that this petition should be deemed to have been filed when mailed.

1. The court of appeals correctly upheld the Tax Court's dismissal of petitioner's suit. As a general rule, the Tax Court has jurisdiction only if a petition is filed within the prescribed 90-day period provided by Section 6213(a) of the Code. *Shipley* v. *Commissioner*, 572 F.2d 212, 213 (9th Cir. 1977); *Vibro Mfg. Co.* v. *Commissioner*, 312 F.2d 253, 254 (2d Cir. 1963). The only exceptions to this jurisdictional requirement are set forth in Section 7502 of the Code. That Section provides relief in two limited

[1] "R." refers to the Joint Appendix filed in the court of appeals.

circumstances. First, if a petition that is in fact delivered to the Tax Court was mailed during the 90-day period and bears a postmark to that effect, the petition is deemed filed as of the date of mailing even if it is received by the Tax Court after the expiration of the 90-day period. Since the "first" copy of the August 4, 1977 letter, which petitioner alleges was mailed during the 90-day period, was never received and filed in the Tax Court, the first statutory exception (Section 7502(a) and (b)) is inapplicable.

Second, if a petition to the Tax Court is sent by registered or certified mail within the 90-day period, Section 7502(c) provides for a *prima facie* presumption that the petition was delivered to the Tax Court as of the date of mailing. Since petitioner did not send the August 4 letter by registered or certified mail, the second exception is likewise inapplicable.

Petitioner nevertheless contends that he should be allowed to prove by testimony from the person who allegedly mailed the alleged petition that it was mailed to the Tax Court on August 4, 1977. As he views the matter, there is no rational distinction between regular mail and registered and certified mail, and therefore his alleged petition, after his proof of mailing, should be presumed to have been delivered to the Tax Court. But petitioner ignores the fact that one of the purposes of Section 7502 was "to avoid testimony as to date of mailing in favor of tangible evidence in the form of an official government notation." *Shipley* v. *Commissioner*, *supra*, 572 F.2d at 214. Mailing a

petition to the Tax Court is not equivalent to filing unless one comes within the terms of Section 7502. *Drake* v. *Commissioner*, 554 F.2d 736, 738-739 (5th Cir. 1977); *Boccuto* v. *Commissioner*, 277 F.2d 549, 552-553 (3d Cir. 1960).

2. Petitioner further argues (Pet. 26-27) that the decision below violates his due process rights and the separation of powers doctrine (*ibid.*). But petitioner was not prohibited from proving relevant facts. Instead, the facts he seeks to prove were held to be irrelevant because, even if they were true, they would not have brought him within the reach of the operative statutes. For the same reason, the proffered testimony of the employee of the Internal Revenue Service who acknowledged that he received the letter addressed to the Service (Weissman) (Pet. 27-29) was irrelevant. At most, Weissman's testimony would have corroborated the accountant's testimony that the August 4, 1977 letter was mailed to the Internal Revenue Service in Los Angeles. Since the accountant's testimony was beside the point, there was no reason to admit Weissman's corroborating testimony.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

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